

# McGREGOR & LEGERE

ATTORNEYS AT LAW, P.C.

15 COURT SQUARE – SUITE 500  
BOSTON, MASSACHUSETTS 02108  
(617) 338-6464  
FAX (617) 338-0737

GREGOR I. MCGREGOR, ESQ.  
E-mail: gmcgregor@mcgregorlaw.com  
(617) 338-6464 ext. 123

VIA E-MAIL & FIRST-CLASS MAIL

March 21, 2018

Zachary K. Griefen, Esq.  
Conservation Law Foundation  
15 East State Street, Suite 4  
Montpelier, VT 05602

**RECEIVED**

**MAR 26 2018**

**RE: CLF Notice of Intent to Sue under the Clean Water Act  
Devens, Massachusetts**

OFFICE OF THE REGIONAL ADMINISTRATOR

Dear Mr. Griefen:

This Firm represents the Devens Enterprise Commission (“DEC”) with respect to the January 23, 2018 Notice of Violations and Intent to File Suit under the Clean Water Act (“CWA”) sent by the Conservation Law Foundation (“CLF”) to the Massachusetts Development Authority (“MassDevelopment”) and DEC.<sup>1</sup>

For the reasons outlined below, we urge CLF to reconsider its position on this matter and not pursue the threatened litigation against DEC. It is apparent that CLF sent its January 23 letter without doing its homework to understand the basic facts and relevant circumstances underlying its allegations. It seems that CLF’s approach here was “ready, fire, aim.”

For instance, DEC could not provide any equitable relief that CLF may seek through its threatened litigation, as it is neither a viable defendant nor a necessary party.

DEC discharges nothing and cannot be responsible for the alleged CWA violations (or any CWA violation), because it does not own or operate any property or infrastructure. DEC was created by the state Legislature to regulate development activities at Devens, but has no enforcement or regulatory authority under the CWA.

Construction or other work permitted by DEC must satisfy its stormwater regulations, which are stricter than federal and state stormwater laws, regulations, standards and limitations.

---

<sup>1</sup> CLF’s January 23 letter alleges the following CWA violations: discharging stormwater from systems of conveyances, including roadways, storm drains, storm sewers, drainage ditches, and outfalls located throughout Devens to the waters of the U.S. without a permit (33 U.S.C. § 1311(a)); discharging stormwater from systems of conveyances, including roadways, storm drains, storm sewers, drainage ditches, and outfalls located throughout Devens to the waters of the U.S. without a permit (33 U.S.C. § 1342); failure to obtain coverage under NPDES permit for small municipal separate storm sewer systems (“MS4s”) (33 U.S.C. § 1342); and failure to comply with specific requirements of either NPDES or MS4 permits (40 C.F.R. §§ 122.32 - 122.36).



## McGREGOR & LEGERE

Furthermore, DEC is immune from civil penalties pursuant to the Eleventh Amendment and other laws. DEC's enabling legislation establishes that it is an "arm of the state" which performs an essential government function.

CLF surprisingly ignores DEC's commitment to environmental protection, which has resulted in numerous awards and recognitions. Environmental organizations including MassAudubon and the Nashua River Watershed Association point to DEC as a model for low-impact, sustainable development practices.

As a result of these efforts, DEC understands that water quality in the Nashua River has improved under its watch.

### **BACKGROUND**

The inaccuracies in its January 23 letter suggest that CLF did not take the time to familiarize itself with DEC's enabling legislation or understand DEC's role at Devens. DEC was created by the Massachusetts Legislature by Chapter 498 of the Acts of 1993. Section 1 of that enabling legislation lists the following purposes:

to promote the expeditious and orderly conversion and redevelopment of Fort Devens for nonmilitary uses, including, but not limited to, housing, industrial, institutional, educational, governmental, recreational, conservation, commercial or manufacturing uses, in order to prevent further blight, economic dislocation and additional unemployment, and to aid in strengthening the local economy, the regional economy and the economy of the Commonwealth. It is also the purpose of this Act to provide an interim governmental structure for Devens which will assume specified local authority and duties, in recognition of the state and local partnership necessary for the successful redevelopment of Devens, and the duty of the Commonwealth in this regard to consider local and regional interests.

Section 9 provides that: "There shall be a body corporate known as the Devens Enterprise Commission, in this act called the 'commission.' The exercise by the commission of its powers and the discharge of its duties shall be deemed and held to be the performance of an essential government function." (emphasis added).

Section 11 establishes DEC's powers and responsibilities, and charges DEC with developing regulations to "carry out the purposes and intent of the General Laws relating to zoning, subdivision control, historic commission and conservation commission regulatory powers ... ." Section 11(2) further specifies that DEC may exercise the powers of several municipal boards, including: special permit granting authorities, planning boards and zoning boards of appeals under the state Zoning Act (G.L. c. 40A) and Subdivision Control Law (G.L. c. 41, §§ 81A-81J and 81K-81GG); conservation commissions pursuant to the state Wetlands Protection Act (G.L. c. 131, §§ 40 and 40A); boards of health (G.L. c. 111, §§ 26-32); and



historic district commissions (G.L. c. 40C). Section 11(5)(k) creates enforcement authority for DEC “to enforce the reuse plan and by-laws, the regulations and all other by-laws and regulations.”

Section 12 establishes the powers and responsibilities of the Government Land Bank (predecessor to MassDevelopment), and provides that “The Bank is hereby designated as the public agency or instrumentality exclusively authorized and empowered to do all acts and things necessary or convenient to negotiate the acquisition of and acquire Fort Devens, or interests therein, improvements thereon, including, without limitation, buildings and utility systems, and equipment and personal property, from the federal government, provided that the Towns and other public agencies and institutions of the commonwealth may also negotiate the acquisition of portions of Fort Devens as public benefit transfers in accordance with section fifteen of this act. For purposes of chapter 40D of the General Laws, Devens shall be deemed a municipality and until July 1, 2033, the bank shall be deemed the industrial development financing authority for Devens.”<sup>2</sup>

Section 12(g) further conveys to MassDevelopment the power to “layout, construct, maintain, and operate a system or systems of common sewers and drains in public and private ways, and a system or systems for sewage treatment and disposal, for all or a part of Devens, which system may be a part of a regional sewage treatment and disposal system in which the Towns or anyone of them may be included, at its or their own expense, as required for the public or the public health, and determine assessments and other charges related to laying out, constructing and maintaining such sewerage systems, all as provided in chapter eighty-three of the General Laws.”

Had CLF made an effort to familiarize itself with DEC’s regulations governing stormwater at Devens, it would have found them to be more stringent than federal or state law.<sup>3</sup> DEC’s Development Rules and Regulations establish performance standards for stormwater management at 974 CMR 4.08, and Stormwater Management is also addressed under Design Standards at 974 CMR 3.04(4). These stricter Devens regulations include the following:

- 974 CMR 3.04(4)(a)(3) establishes “Design Standards” which require Low Impact Development (“LID”) design “to allow for full utilization of the property while maintaining the predevelopment characteristics of the site as though it were

<sup>2</sup> Section 2 defines “Bank” to mean “the Government Land Bank, established by chapter two hundred and twelve of the acts of nineteen hundred and seventy-five, as amended.”

<sup>3</sup> The requirements from a draft Stormwater Pollution Prevention Plan prepared for Devens were incorporated into DEC’s stormwater rules and regulations. DEC’s Bylaws and Development Rules and Regulations reference the standards set forth in the Devens Water Resources Protection Report. In addition, DEC compiles annual stormwater maintenance reports and records for all businesses at Devens, and incentivizes energy and water efficient development, renewable energy systems, and low-impact development at Devens through various measures. Devens Green Infrastructure Guidelines for All Projects in Devens: Devens Green Roof Policy



a 'green field' (volume, frequency, peak runoff rate) to the maximum extent feasible" (emphasis added).

- 974 CMR 3.04(4)(a)(5) requires that all "onsite stormwater management reuse and recharge systems shall be used for roof runoff (excluding metal roofs) whenever feasible."
- 974 CMR 3.04(4)(b) requires that "Site generated stormwater shall be managed onsite to meet green field requirements. Conveyance to a common system (operated by the owners of more than one lot), or to the Devens Stormwater System (DSS), managed by MassDevelopment is an option once green field requirements have been met and all reuse and onsite infiltration methods have been exhausted."
- 974 CMR 3.04(4)(b)(4) requires that "Catch basins or other drainage features in loading/unloading and/or fueling areas shall be equipped with post-indicator valves (which are to remain in the closed position) on the outlets for containment in the event of any spills."
- 974 CMR 4.08(2)(a) requires that "All applications, regardless of whether the project is subject to the Wetlands Protection Act or not, shall design the stormwater management system in compliance with the Massachusetts DEP Stormwater Management Standards, January 2008, as amended ('SMS') and the Massachusetts Stormwater Handbook, February 2008, as amended ('Handbook')."
- 974 CMR 4.08(2)(c) provides that "Where there is a conflict between the requirements set forth below and the Handbook and/or Plan, the Plan and the requirements below shall govern." Specifically:
  - "Irrigation water shall be derived from detained treated stormwater (stormwater harvesting), or roof drainage to the maximum extent feasible."
  - "All projects shall incorporate LID techniques for stormwater management to the maximum extent feasible. For projects proposing traditional closed drainage systems, the Applicant shall demonstrate to the satisfaction of the DEC why LID stormwater management design methods are not feasible."
- 974 CMR 4.08(3)(a) establishes that "Biofiltration basins shall be the preferred method to reduce curbing, piping and structures and provide additional overland treatment and recharge" and includes design requirements beyond those found in the Handbook including "Any low-flow outlets shall be designed to prevent clogging" and "[f]or bioretention cells, abutting pavement, that are designed to capture sheet flow, the edge of pavement shall be reinforced to ensure the integrity of pavement is maintained (curb stops, stone, turf, landscape timbers, plantings or other acceptable methods or combination thereof.)"
- 974 CMR 4.08(3)(b) requires that stormwater discharge offsite shall not exceed pre-development rates for the 2, 10, 25, 50 and 100-year storm events.



## McGREGOR & LEGERE

- 974 CMR 4.08(4)(a) minimizes basin size to 5,000 square feet or less per basin.
- 974 CMR 4.08(4)(c) requires post-construction erosion control measures to ensure temporary and permanent stabilization.
- 974 CMR 4.08(4)(f) requires that the floor for all basins, infiltration structures, and swales be at least four feet above high groundwater.
- 974 CMR 4.08(7)(d) requires that applicants submit annual stormwater monitoring and maintenance reports to DEC detailing inspection and maintenance of BMPs.

DEC has also established Water Resource Protection Overlay Districts and promulgated Regulations with performance standards governing work therein. 974 CMR 4.09.

### **DEC IS NOT A VIABLE DEFENDANT OR A NECESSARY PARTY TO CLF'S THREATENED LITIGATION**

The CWA allows for citizen suits against:

any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . .

33 U.S.C. §1365(a)(1).

DEC is not, and could not be, violating any effluent standards or order issued under the CWA. Had CLF researched the ownership and operation of Devens, it would have known this. Instead, CLF's January 23 letter wrongly alleges that "MassDevelopment and DEC have owned and/or operated Devens since at least 1996."

DEC is not an owner or operator of Devens.<sup>4</sup> In fact, DEC does not own and/or operate any property, buildings or infrastructure, and therefore does not discharge pollutants (or anything else) anywhere. As discussed above, the enabling legislation clearly conveyed to MassDevelopment the authority to design, build, maintain, and operate a system of drains and sewers at Devens. Chapter 498 of the Acts of 1993, Section 12(g). DEC, on the other hand, was granted regulatory and permitting powers at Devens.<sup>5</sup> Chapter 498 of the Acts of 1993, Section 11.

<sup>4</sup> "Owner or operator means the owner or operator of any 'facility or activity' subject to regulation under the NPDES program." 40 CFR § 122.2.

<sup>5</sup> Devens was granted, but has not employed, authority to "exercise the power of eminent domain within Devens ... with the approval of the Bank" and to "acquire easements and other interest in land contiguous or adjacent to Devens in conformance with the Reuse Plan". Chapter 498 of the Acts of 1993, Section 11(5)(e-f).



## McGREGOR & LEGERE

DEC is not authorized to implement or enforce the CWA, either. EPA has not delegated CWA permitting authority to DEC. As noted above, however, DEC is effectively ensuring compliance with the CWA by enforcing its Development Rules and Regulations, which establish performance standards for stormwater management at Devens that are more stringent than federal or state law.

In other words, DEC could not apply for or issue a CWA permit, and could not take enforcement action or otherwise remedy any alleged CWA violations at Devens. Therefore, any equitable relief that CLF may seek could not be provided by DEC. DEC is neither a viable defendant nor a necessary party in the litigation threatened by CLF.

### **DEC IS AN ARM OF THE STATE AND IS PROTECTED AGAINST CIVIL PENALTIES BY THE ELEVENTH AMENDMENT AND OTHER LAWS**

Basic initial research (and a recent decision in its own court case) should have made CLF aware that, even if DEC were a viable defendant (which it is not), it would be immune from any claims for civil penalties in CLF's threatened lawsuit pursuant to the Eleventh Amendment to the United States Constitution. *Conservation Law Foundation, Inc. v. Pease Development Authority*, 2017 WL 4310997 (D.N.H. Sept. 26, 2017). As discussed above, DEC's enabling legislation establishes that it is an "arm of the state."

Specifically, Chapter 498 of the Acts of 1993, Section 9, provides DEC's "exercise ... of its powers and the discharge of its duties shall be deemed and held to be the performance of an essential government function." Furthermore, Section 11(6) provides that DEC's "accounts and expenditures shall be subject to audit by the state auditor."

Indeed, M.G.L. c. 23G, §32 explicitly preserves sovereign immunity under Chapter 498 of the Acts of 1993.

In summary, DEC is an "arm of the state" and immune from civil penalties under the Eleventh Amendment to the United States Constitution and other laws.

### **DEC ALREADY ENSURES THAT STORMWATER GENERATED AT DEVENS DOES NOT HARM WATER QUALITY**

Turning to the merits, while CLF's generic letter makes it unclear what violations of effluent standard(s) or limitation(s) are alleged, DEC disputes that any such violation currently exists. MassDEP has confirmed that, based upon its inspection of federal records and consultation with EPA Region 1 staff, there are no permit violations for the Devens Regional Enterprise Zone under Municipal Separate Storm Sewer System or other CWA permits.

Furthermore, it is DEC's understanding that water quality in the Nashua River has improved since MassDevelopment and DEC have become involved with Devens.



## McGREGOR & LEGERE

DEC prides itself on being a steward for the natural environment. DEC's commitment to environmental protection is consistent with its enabling legislation – Section 1A of Chapter 498 provides an “Overall Goal Statement”, and lists eighteen goals and objectives, the first of which is that “[d]evelopment must be sustainable, which means achieving a balance of economic, social and environmental needs while maintaining and enhancing the natural resource base.”

DEC's efforts to protect the natural environment have resulted in numerous awards and recognitions from environmental organizations. Those include:

- FY 2005 State Agency Environmental Purchasing and Sustainability Award;
- 2005 Commonwealth of Massachusetts Sustainable Development Award;
- 2006 Worcester Business Journal/MassAudubon Public Private Partnership Award;
- 2007 MA Smart Growth, Smart Energy Award;
- 2008 US EPA Environmental Merit Award;
- 2010 Environmental Business Council of New England Environmental Energy Achievement Award;
- 2012 Nashoba Valley Chamber of Commerce Service and Leadership Award;
- 2013 USGBC MA Chapter Innovation in Green Design – Devens Sustainable Housing Pilot (LID regulatory and incentive components);
- 2015 APA National SCD Project of the Year – Devens Sustainable Housing Pilot (LID components);
- 2015 APA MA Project of the Year – Devens Sustainable Housing (LID regulatory components);
- 2018 recognition for National Excellence and awarded 4-STAR Sustainability Rating from STAR Communities (nearly perfect scores for green infrastructure and natural resource protection); and
- 2018 nominee for the Gothenburg International Sustainability Award.

Also, the Nashua River Watershed Association is nominating the Nashua River for Federal Wild and Scenic River designation and has used Devens as an example of excellent river stewardship and stormwater management regulations in their submittal.

To date, over 1,400 acres within Devens have been permanently protected, including over 900 acres along the Nashua River (owned by USFWS and MA FWS). Devens also has an Open Space and Recreation Advisory Committee, which is comprised of representatives from MassDevelopment, DEC, Ayer, Harvard, Shirley, USFWS, MA FWS, Nashua River Watershed Association, MassAudubon and MA EOEEA.

As discussed above, DEC's regulations governing stormwater are more stringent than federal or state law. Therefore, any construction or other work permitted by DEC is already designed and conditioned to exceed state and federal stormwater standards. As a practical



## McGREGOR & LEGERE

matter, this means that DEC is already doing its part to ensure that any stormwater discharges protect the natural environment generally and water quality in particular.<sup>6</sup>


### CONCLUSION

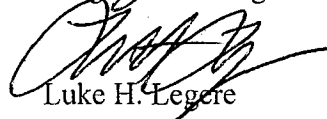
In summary, the allegations contained in CLF's January 23 letter mischaracterize DEC's role at Devens and betray a fundamental misunderstanding of the facts. DEC owns, operates, and discharges nothing from Devens and, in any event, disputes that any CWA violations are occurring. To the contrary, DEC believes that its efforts have improved water quality in the Nashua River. CLF cannot reasonably expect to obtain any equitable relief, civil penalties, or legal fees as a result of its threatened litigation against DEC.

For the foregoing reasons, CLF should not pursue the threatened litigation against DEC.

Please do not hesitate to contact us should you have any questions.

Sincerely,

  
Gregor L. McGregor

  
Luke H. Legere

cc: Seth Kerschner, Esq.  
Matt Wisnieff, Esq.  
Christopher Kilian, Esq.  
Scott Pruitt, Administrator, EPA (via first-class mail)  
Alexandra Dapolito Dunn, Regional Administrator, EPA Region 1 (via first-class mail)  
Martin Suuberg, Commissioner, MassDEP (via first-class mail)  
James Lampke, Esq.  
Jonathan Ettinger, Esq.

<sup>6</sup> DEC understands that MassDevelopment is prepared to file a Notice of Intent for a small MS4 General Permit as soon as possible. As CLF is surely aware, EPA issued a final MS4 General Permit in January 2017, which was initially intended to become effective on July 1, 2017. A June 29, 2017 Delay Notice from EPA Region 1 Acting Regional Director Deborah Szaro, pursuant to 5 U.S.C. §705, announced the postponement of the effective date for the MS4 General Permit for one year, to July 1, 2018. That Delay Notice concluded that "justice requires postponing the July 1, 2017 effective date of the Massachusetts permit for one year pending judicial review" to allow "EPA ample time to determine what, if any, changes are appropriate in the permit and to determine next steps." It further recognized that the action would "postpone certain obligations – and the associated costs – that would otherwise be incurred in the first year's implementation" of the permit, including "monetary and staff time for preparation and submittal of a Notice of Intent ('NOI') to be covered by the permit" as well as updates to existing municipal Stormwater Management Plans.





McGregor & Legere  
15 Court Square  
Boston, MA 02108

BOSTON  
MA 021  
21 MAR '18  
PM 9 L



Alexandra Dapolito Dunn  
Regional Administrator  
Environmental Protection Agency  
EPA Region 1  
5 Post Office Square - Suite 100  
Boston, MA 02109-3912

02109-394625

